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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

O.W.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F079358

(Super. Ct. No. 17CEJ300102)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Leanne L. LeMon, Commissioner.

Juvenile Law Center and William L. Chaddock, for Petitioner.

No appearance for Respondent.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County Counsel, for Real Party in Interest.

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* Before Detjen, Acting P.J., Meehan, J. and DeSantos, J.

On May 20, 2019, the juvenile court sustained a supplemental petition pursuant to Welfare and Institutions Code section 387¹ and removed three-year-old Z.W. from the physical custody of her father, O.W (father). The court terminated family maintenance services and set a section 366.26 hearing for August 26, 2019. Father seeks an extraordinary writ from the juvenile court's setting order. (Cal. Rules of Court, rule 8.452.) He contends there was insufficient evidence to support the removal order and the juvenile court abused its discretion in ordering him to complete services he did not need. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

In April 2017, then 16-month-old Z.W. was evaluated for burns on her right buttock and left foot which she sustained while in her mother's care.² The burn on Z.W.'s buttock appeared to be old and the one on her foot was blistering. Mother could not provide a reasonable explanation for the burns. She thought they were an allergic reaction. Emergency medical technicians who transported Z.W. to the hospital reported seeing drug paraphernalia scattered on the floor of mother's home. Father was incarcerated in county jail on charges of domestic violence.

The Fresno County Department of Social Services (department) took Z.W. into protective custody at the hospital and placed her with a paternal cousin upon her release. The department filed an original petition under section 300, alleging the physical injuries Z.W. suffered while in her mother's care brought Z.W. within the juvenile court's jurisdiction under subdivisions (a) (serious physical harm), (b) (failure to protect) and (e) (serious physical abuse). As to father, the department alleged one count under subdivision (g) (no provision for support) based on his custody status and failure to arrange a suitable plan for Z.W.'s ongoing care.

¹ Statutory references are to the Welfare and Institutions Code.

² Mother did not file a writ petition and is not a party to these proceedings.

The juvenile court found prima facie evidence in the petition to detain Z.W. at the detention hearing on April 7, 2017. The court ordered the department to offer father parenting, substance abuse, mental health and domestic violence services.

Father was released from custody on May 12, 2017, homeless and on probation. He moved into the Fresno Rescue Mission. He reported a history of drug use and domestic violence. He used marijuana medicinally for pain and epilepsy. The pain stemmed from injuries he received after being hit by a city bus. He had been sober for six months but marijuana was his drug of choice. He said he was diagnosed with Post Traumatic Stress Disorder but had never been treated for it.

On May 30, 2017, father completed a substance abuse assessment with Erica Flitcraft, a certified substance abuse specialist. He reported prior use of amphetamine and cocaine. He also reported experiencing withdrawals, recent cravings and an increase in his usage. Flitcraft referred him for residential substance abuse treatment because he told her he needed that level of structure to prevent relapse.

In June 2017, father entered WestCare residential treatment facility. He asked the department to place Z.W. with him there but the department refused because of his domestic violence and substance abuse history. It asked him to complete a domestic violence assessment, demonstrate willingness to participate in services and attain stable and safe housing for himself and Z.W.

In July 2017, the juvenile court sustained the section 300, subdivisions (a) and (b) allegations as to mother and dismissed the remaining allegations. The court removed Z.W. from the parents, denied mother reunification services and ordered father to participate in the services offered at the detention hearing.

In August 2017, father filed a modification petition (§ 388) asking the juvenile court to place Z.W. with him at WestCare and provide him family maintenance services.

He was active in WestCare's program and doing well. He regularly visited Z.W. and developed a strong bond with her.

At a hearing on father's section 388 petition in October 2017, the juvenile court denied his request for family maintenance services but ordered the department to begin liberal visitation immediately. On November 1, the department placed Z.W. with father at WestCare on an extended visit. In January 2018, the court terminated reunification services and ordered Z.W. placed with father under a plan of family maintenance, which required him to meet the objectives of the reunification plan, including demonstrating he was not using controlled substances by testing negative on all drug tests.

Father maintained Z.W. in his custody under the department's supervision and made significant progress. He transitioned into outpatient substance abuse treatment and participated in weekly mental health counseling. He was employed and saving to obtain his own home. He was very protective of Z.W., refusing to leave her in the care of anyone he did not trust. However, he was struggling to maintain his sobriety. Initially, it appeared he was drinking alcohol because he had positive tests for alcohol in addition to numerous "no shows." However, in February 2019, he tested positive for amphetamine. As a result, the department removed Z.W. from father's care, placed her with a paternal aunt and filed a supplemental petition (§ 387).

Father admitted drinking alcohol because he was stressed but denied willingly using methamphetamine, claiming he unintentionally consumed it when he took a drink from a relative's coffee cup, which contained methamphetamine. He was frustrated by the department's continued involvement in his life, stating "I can't do this anymore, I am ready to throw in the towel, I can't live like this." The social worker tried to encourage him and asked how the department could help him with his sobriety. They agreed he would report to WestCare for aftercare, attend two support meetings a week, contact his therapist and continue to randomly drug test. While in the car with the social worker on

her way to her aunt's home, Z.W. stated that her mother had been spending the night with father. Father denied mother was staying with them, explaining Z.W. may have thought she was in their home because they video chatted with her. He said mother completed substance abuse treatment and was living in a women's shelter.

The department recommended the juvenile court terminate father's family maintenance services and discontinue any further reunification efforts. A social worker explained to father that he had exceeded the time limit for receiving reunification services and had not benefitted from them. Father did not believe he needed services and did not understand why Z.W. could not be returned to his custody. He pointed out that he was the nonoffending parent and should not have to "go through all of this."

On May 20, 2019, the juvenile court conducted a contested hearing on the supplemental petition. Flitcraft testified she instructed father during their initial assessment that he was not to consume any mood-altering substances during the child welfare case, including alcohol and marijuana. However, he tested positive for alcohol five times, which concerned her. She was also concerned because she did not believe he understood the seriousness of consuming alcohol. She also requested further testing of the sample that yielded the positive amphetamine result. The results of the additional testing yielded positive results for amphetamine and methamphetamine. Since February 2019, he tested positive for opiates, alcohol and failed to show twice. He did not have a prescription for the opiate. Her only concern with father was his ability to stay sober given the continual positive drug testing, including his no shows.

Social worker Sarah Ruminson testified father's sobriety and ability to safely care for Z.W. was an ongoing concern she discussed with her supervisor monthly. In addition, someone from the department met with father every other month to discuss his positive test results to no avail. His positive result for methamphetamine in February 2019 was the turning point, causing the department to remove Z.W. from his custody. She did not

believe there was anything further the department could do to assist father in reunifying with Z.W.

Father denied being under the influence of mind-altering substances while having Z.W. in his care. He denied intentionally consuming methamphetamine but acknowledged placing himself in a compromising situation. He took excellent care of Z.W. every day and could not understand why an occasional beer should cause him to lose custody of her.

The juvenile court sustained the supplemental petition, finding family maintenance services had been ineffective in protecting Z.W. The juvenile court stated father's repetitive use of alcohol alone and his minimization about his consumption was sufficient cause to sustain the petition. Although father claimed to have a beer once in a while, the court pointed to his statement he consumed a 40-ounce beer, which was a significant amount. The court also pointed to evidence he had been offered extensive services and repeatedly warned yet continued to consume alcohol. The court ordered Z.W. removed from father's custody, terminated family maintenance services and declined to offer either parent family reunification services. The court set a section 366.26 hearing for August 26, 2019.

DISCUSSION

Father makes various assertions, none of which raise a cognizable legal challenge to the juvenile court's ruling on the supplemental petition. Specifically, father asserts that because he was the "non custodial, non-offending" parent and a substance *user* rather than a substance abuser, he should not have been required to "jump through so many hoops." He cites neither statutory nor relevant case authority to bolster his arguments. Consequently, we could, as real party in interest urges, dismiss father's petition as facially inadequate for failing to ascribe error to the court's orders on the supplemental

petition. However, we decline to do so, opting instead to liberally construe the petition in favor of reviewing it on the merits. (Cal. Rules of Court, rule 8.452(a)(1).)

Overview of Juvenile Court Jurisdiction and Disposition

The juvenile court may assert its dependency jurisdiction over a child if the actions of one parent bring that child within the statutory definitions set forth in section 300. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.) If the court finds grounds for dependency jurisdiction and decides the child must be removed from parental custody, the court must first determine whether there is a noncustodial parent that desires to assume custody of the child. If such a parent requests custody, the court must place the child with that parent unless it finds by clear and convincing evidence that placement with that parent would be detrimental to the child's safety and well-being. (§ 361.2, subd. (a).) If the court orders the child removed from the custody of all parents, it must provide reunification services to the parents unless it finds grounds to deny services under any of the statutory exceptions. (§ 361.5, subds. (a) & (b).)

Until the juvenile court dismisses its jurisdiction, it may make various orders regarding the child. For example it may, as occurred here, place the child in parental custody with family maintenance services. It may subsequently find cause to remove the child under section 387. A supplemental petition filed under section 387 is the vehicle by which the department seeks to change the placement of a dependent child from a parent's care to a more restrictive placement, such as foster care. (*In re F.S.* (2016) 243 Cal.App.4th 799, 808 (*F.S.*); *In re T.W.* (2013) 214 Cal.App.4th 1154, 1161 (*T.W.*); see Cal. Rules of Court, rule 5.560(c).) The petition must allege facts that establish the court's previous dispositional order was ineffective. (§ 387, subd. (b); *F.S.*, at p. 808.) The department need not, however, allege any new or additional grounds for dependency because the juvenile court already has jurisdiction over the child based on its findings on the original section 300 petition. (*T.W.*, at p. 1161; *In re A.O.* (2010) 185 Cal.App.4th

103, 110.) If the court finds the factual allegations are true by a preponderance of the evidence, it conducts a dispositional hearing to determine whether removing custody is appropriate pursuant to the same procedures as apply in an original dispositional hearing. (*F.S.*, at p. 808; *In re H.G.* (2006) 146 Cal.App.4th 1, 11; see Cal. Rules of Court, rule 5.565(e) [requirement for bifurcated hearing on a subsequent or supplemental petition].) “ ‘The ultimate “jurisdictional fact” necessary to modify a previous placement with a parent or relative is that the previous disposition has not been effective in the protection of the minor.’ ” (*In re A.O.*, at p. 110.) We review the juvenile court’s jurisdictional and dispositional findings for substantial evidence. (*T.W.*, at p. 1161.)

The “Noncustodial, Nonoffending” Parent

Father mistakenly believes that because Z.W. was in her mother’s custody when originally removed and because the juvenile court did not sustain any of the allegations in the original petition as to him that he was entitled to custody of Z.W. without satisfying the court that she is safe in his care. Though relevant at the initiation of the proceedings, father’s status as “noncustodial, nonoffending” was not relevant after the dispositional hearing. As explained above, the juvenile court may exercise its jurisdiction based on the actions of one parent. Here, the court found the actions of Z.W.’s mother supported exercising its jurisdiction. Therefore, the fact that the court did not find father “offending,” did not deprive it of jurisdiction. Further, the court was not required to place Z.W. with father at the dispositional hearing. It was only required to consider placing her with him as the noncustodial parent and to do so unless it would be detrimental. The court found it would be detrimental and removed Z.W. from his custody. Although father complained throughout the proceedings that as the nonoffending parent he should not have to be subjected to the scrutiny of the department, it was no longer relevant. The question was whether he could safely parent Z.W.

Supplemental Petition

Father contends there was insufficient evidence he was a substance abuser, citing *In re Drake M.* (2012) 211 Cal.App.4th 754 (*Drake M.*). Therefore, he argues, the juvenile court erred in removing Z.W. from his custody. We construe his argument as a challenge to the sufficiency of the evidence to support the court's required finding under section 387. We conclude *Drake M.* is wholly distinguishable and substantial evidence supports the court's ruling on the supplemental petition.

In order to sustain the supplemental petition, the juvenile court was required to find by a preponderance of the evidence that the facts alleged proved that maintaining Z.W. in father's custody with family maintenance services had proven ineffective. The supplemental petition alleged father tested positive for alcohol in March and August 2018, and January 2019, and for amphetamine in February 2019, and failed numerous times to submit to substance abuse testing. At trial, father sought to prove that he was an occasional user of alcohol and that his accidental consumption of methamphetamine was a one-time use. However, he reported during his initial substance abuse assessment that he had a history of amphetamine and cocaine use, had experienced withdrawal and cravings and required a high level of substance abuse treatment to prevent relapse. At trial, evidence was adduced that despite repeated warnings, father continued to consume alcohol and other drugs. Flitcraft, a specialist in substance abuse, highly questioned his ability to maintain sobriety and father flatly denied having a substance abuse problem. On that evidence, the juvenile court could find father's repeated use of alcohol as well as use of methamphetamine as evidenced by his positive test demonstrated family maintenance services had proven ineffective in helping him maintain his sobriety.

Drake M. is unavailing because it pertains to a jurisdictional finding under an original petition under section 300, not a true finding on a supplemental petition under section 387. In *Drake M.*, the court reversed a jurisdictional finding under section 300, subdivision (b) that a father who used marijuana medicinally was incapable of providing regular care and supervision of his son because of the father's substance abuse.

(*Drake M.*, *supra*, 211 Cal.App.4th at pp. 757-758, 763-764.) The court held that "jurisdiction based on 'the inability of the parent or guardian to provide regular care for the child due to the parent's ... substance abuse' must necessarily include a finding that the parent at issue is a substance *abuser*. (§ 300, subd. (b).)" (*Id.* at p. 764.) Substance abuse, it further held, must be based on evidence showing the parent was diagnosed with a substance abuse problem by a medical professional or evidence the parent satisfied the diagnostic criteria defined by the American Psychiatric Association. (*Id.* at p. 766.)

Here, the juvenile court was not required to find father was a substance abuser in order to sustain the supplemental petition. Instead, it had to find he was unable to maintain his sobriety with the assistance of family maintenance services. We conclude, for all the reasons set forth above, substantial evidence supports the court's finding.

Family Maintenance Services

Citing *Drake M.*, father contends the juvenile court abused its discretion in requiring him to participate in services he did not need, namely, mental health and substance abuse counseling, parenting classes and random drug testing. *Drake M.* is unavailing on this issue as well.

In *Drake M.*, the court found an abuse of discretion in the juvenile court's order requiring the father to take parenting classes, participate in drug counseling and randomly test for drugs. The court's conclusion, however, was based on insufficient evidence the father was a substance abuser. Requiring him to complete unnecessary services, the court held, was unjustified. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 769-771.) Here, there is

no evidence that the services father was required to complete were unnecessary or unsuitable. Further, had father believed they were, he had multiple opportunities to object to them beginning with the hearing in January 2018 when they were ordered and at anytime thereafter by filing a modification petition under section 388. Having failed to do so, he cannot now complain that they were inadequate or excessive.

We find no error.

DISPOSITION

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.